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No. 90-914

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

MCORP, ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 12 U.S.C. 1818(i)(1) barred the district court presiding over petitioners' bankruptcy case from enjoining the Federal Reserve Board's pending administrative proceedings against petitioners under the Financial Institutions Supervisory Act of 1966, 12 U.S.C. 1818 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C22) is reported at 900 F.2d 852. The opinion of the district court (Pet. App. A1-A13) is reported at 101 Bankr. 483.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1990. A petition for rehearing was denied on August 6, 1990. Pet. App. D1-D2. On October 26, 1990, Justice Scalia extended the time within which to file a petition for a writ of certiorari to and including December 10, 1990. The petition for a writ

of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has vested the Board of Governors of the Federal Reserve System with substantial supervisory authority over the formation, structure, and operation of bank holding companies, *i.e.*, any company that has direct or indirect control of any bank. 12 U.S.C. 1841(a)(1). The Board exercises such authority under, among other statutory schemes, the Financial Institutions Supervisory Act of 1966 (FISA), 12 U.S.C. 1818, as amended by Section 902 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. No. 101-73, Tit. IX, 103 Stat. 450-451.

Under FISA, the Board has authority to begin "cease-and-desist" proceedings against a bank holding company if, in the Board's view, the company "is engaging or has engaged" or the Board "has reasonable cause to believe that [the company] is about to engage, in an unsafe or unsound practice in conducting the business of such [company]." 12 U.S.C. 1818(b)(1); see 12 U.S.C. 1818(b)(3) (Board's authority under Section 1818(b) applies to "any bank holding company, and to any subsidiary (other than a bank) of a bank holding company"). After an administrative hearing,[1] the Board may direct the holding company to "take affirmative action to correct the conditions resulting from any such violation or practice." 12 U.S.C. 1818(b)(1). As amended by Section 902 of FIRREA, FISA further provides that the Board's remedial powers include the authority to order the offending holding company to make restitution to subsidiaries, to dispose of a loan or asset, or to "take such other action as [the Board] determines to be appropriate." Pub. L. No. 101-73, Tit. IX, § 902, 103 Stat. 450-451 (to be codified at 12 U.S.C. 1818(b)(6)).

In addition, the Board has authority under FISA to issue a temporary cease-and-desist order—without first holding a hearing—if it finds that the unsafe or unsound practice "is likely to cause insolvency or substantial dissipation of assets or earnings of the bank, or is likely to seriously weaken the condition of the bank or otherwise seriously prejudice the interests of its depositors" before completion of administrative proceedings under Section 1818(b)(1). 12 U.S.C. 1818(c)(1). The Board's order under this provision may direct "affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings." 12 U.S.C. 1818(c)(1). Such an order is effective immediately upon service and is enforceable by injunction in the appropriate United States District Court. 12 U.S.C. 1818(c)(1) and (d).

FISA provides specific avenues for judicial review of matters involving the Board's enforcement actions.

[1] FISA and the Board's implementing regulations establish comprehensive procedures for exercising these enforcement powers. The statute requires sufficient notice to the holding company of the underlying charge, an evidentiary hearing before an independent presiding official, and a decision based on the hearing record. 12 U.S.C. 1818(b)(1) and (3), 1818(h). Board regulations further provide that the holding company may appear through counsel, compel the attendance of witnesses and the production of documents, adduce any relevant and material evidence, cross-examine adverse witnesses, and present its position through written submissions and oral argument. 12 C.F.R. 263.1 *et seq.*

First, a bank holding company may petition for review of a *final* cease-and-desist order under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, in the appropriate United States Court of Appeals. 12 U.S.C. 1818(h)(2).[2] Second, the United States District Courts have jurisdiction to issue an injunction "setting aside, limiting, or suspending" a *temporary* cease-and-desist order pending completion of the administrative enforcement proceedings. 12 U.S.C. 1818(c)(2). Third, upon the Board's application, the district courts have jurisdiction to enforce compliance with any notice or order issued under Section 1818. 12 U.S.C. 1818(i)(1). FISA, however, expressly bars federal courts from assuming jurisdiction to review or intervene in the Board's enforcement proceedings in any other manner or circumstances, stating that

> except as otherwise provided in [12 U.S.C. 1818] no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

12 U.S.C. 1818(i)(1); see 12 U.S.C. 1818(h)(1).

2. a. In October 1988, the Board issued a "notice of charges" under 12 U.S.C. 1818(b) against petitioner MCorp, a bank holding company headquarted in Texas, and two of its subsidiaries, petitioners

[2] Once a petition for review is filed, FISA provides that the court of appeals' jurisdiction shall be "exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the agency." 12 U.S.C. 1818(h)(2). The sole exception to this exclusive jurisdiction is limited to instances where the Board, with the court's permission, modifies, terminates, or sets aside its order. See 12 U.S.C. 1818(h)(1) and (2).

MCorp Financial, Inc., and MCorp Management (collectively petitioners or MCorp). Petitioners owned 25 subsidiary banks, many of which were in deteriorating financial condition and could not meet the Comptroller of the Currency's requirements for minimally acceptable capital reserves. The Board alleged that MCorp

> was engaging in unsafe and unsound practices, likely to cause substantial dissipation of the assets of MCorp that could be used to allow MCorp to serve as a source of financial strength for the subsidiary Banks.

Pet. App. C2; see 12 C.F.R. 225.4(a)(1) (Regulation Y); *Policy Statement; Responsibility of Bank Holding Companies to Act as Sources of Strength to Their Subsidiary Banks*, 52 Fed. Reg. 15,707 (1987). Accordingly, the Board notified petitioners of the convening of an administrative hearing to determine whether they should be ordered to cease and desist from specified unsafe and unsound practices and to undertake appropriate remedial measures.[3]

The Board postponed resolution of the "source of strength" charges pending MCorp's attempt to secure "open bank" financial assistance from the Federal Deposit Insurance Corporation. See 12 U.S.C. 1823(c). In late March 1989, however, the FDIC denied

[3] At the same time, the Board issued temporary cease-and-desist orders under 12 U.S.C. 1818(c)(1) that prohibited MCorp from dissipating its assets through dividend payments or unusual business transactions, and directed MCorp to identify those subsidiary banks that would receive capital infusions from MCorp's corporate assets and resources. See Order, *In re MCorp*, No. 88-062-B-HC (Fed. Res. Bd. Oct. 19, 1988); Amended Order, *In re MCorp*, No. 88-062-B-HC (Fed. Res. Bd. Oct. 26, 1988).

MCorp's request, concluding that such financial assistance would not be in the public interest.

b. Soon after the FDIC's decision, three of MCorp's creditors filed an involuntary petition against MCorp in the United States Bankruptcy Court for the Southern District of New York. On March 28 and 29, 1989, the Comptroller of the Currency declared a total of 20 of MCorp's 25 subsidiary banks insolvent and, by operation of law, placed them under the receivership of the FDIC. On March 31, MCorp filed voluntary bankruptcy petitions in the United States Bankruptcy Court for the Southern District of Texas. Pet. App. C2-C3.[4]

At this time, the Board issued a second notice of charges against MCorp. This notice alleged that MCorp had violated Section 23A of the Federal Reserve Act, 12 U.S.C. 371c, which, among other things, imposes collateral requirements on extensions of credit by a subsidiary bank to a nonbank affiliate.[5] The Board accordingly notified MCorp that a hearing would be held

> for the purpose of taking evidence on the charges [and] to determine whether an appropriate order should be issued under [12 U.S.C. 1818(b)] and the [Bank Holding Company] Act requiring MCorp and MCorp Management to cease and desist from the practices and violations of law * * * specified or to take such af-

[4] The voluntary and involuntary bankruptcy proceedings were later consolidated in the Southern District of Texas. Pet. App. C2.

[5] In particular, the notice claimed that MCorp had caused two of its closed banks to lend $63.7 million to MCorp Management without requiring sufficient collateral. Pet. App. C2-C3.

> firmative action as may be appropriate under the circumstances of this matter.

Notice of Charges ¶ 9, *In re MCorp*, No. 88-062-B2-HC (Fed. Res. Bd. Mar. 30, 1989).[6]

c. Before the Board held an administrative hearing on the outstanding charges, MCorp filed an adversary bankruptcy proceeding against the Board in the Southern District of Texas. MCorp sought a temporary restraining order and a preliminary injunction to prevent the Board from prosecuting its administrative charges and taking further actions against MCorp wihout prior approval of the bankruptcy court. On May 3, 1989, the bankruptcy court denied MCorp's request for temporary relief. Pet. App. C3.

The Board then filed in the district court for the Southern District of Texas a motion to withdraw the reference of the adversary proceeding to the bankruptcy court. See 28 U.S.C. 157(d). The district court granted that motion on May 12, thereby agreeing to exercise jurisdiction over MCorp's request for injunctive relief. Pet. App. C3.

3. On June 9, the district court granted MCorp's motion and issued a preliminary injunction against the Board's administrative enforcement proceedings. Pet. App. A1-A13. The court concluded that the express jurisdictional limitation contained in FISA, 12 U.S.C. 1818(i)(1)—providing that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement" of any Board order, except as set forth in the statute—has "been overridden

[6] In late May 1989, the Board issued a second notice of charges (relating to the original October 1988 notice), alleging that MCorp had failed to act as a "source of strength" to its five remaining subsidiary banks. Pet. App. C2-C3.

through control of the debtor's estate having been entrusted to the authority of the bankruptcy court." 101 Bankr. at 487;[7] see 28 U.S.C. 1334(d). Alternatively, the court determined that "the Board's generalized, diffuse interest in the holding company as well as the duplicative, distracting hearings militate for its being not exempt from the [automatic stay provisions of the Bankruptcy Code, 11 U.S.C. 362]." Pet. App. A10. Moreover, the court held that it had general equitable power under 11 U.S.C. 105 to enjoin the Board's proceedings that would threaten MCorp's assets or otherwise impede MCorp's reorganization. Pet. App. A10-A11.

4. In May 1990, the court of appeals reversed and vacated the injunction with respect to proceedings on the Board's Section 23A charges. Pet. App. C1-C22.[8] The court rejected petitioners' contention that the bankruptcy jurisdiction conferred by 28 U.S.C. 1334 supersedes or otherwise qualifies FISA's express limitation (12 U.S.C. 1818(i)) on a court's equitable

[7] This page of the district court's opinion is omitted from the copies of the appendix to the petition served on the government. We have accordingly included it as an appendix to this brief.

[8] The court of appeals, however, remanded with instructions to enjoin proceedings on the Board's source of strength charges because those "proceedings exceed[ed] its statutory authority." Pet. App. C1; see *id.* at C12-C22. The Solicitor General, on behalf of the Board, has recently filed a petition for a writ of certiorari seeking review of that aspect of the court of appeals' judgment invalidating the "source of strength" regulations. *Board of Governors* v. *MCorp Financial, Inc.*, petition for cert. pending, No. 90-913. In our view, this Court can resolve the distinct and separate substantial issues presented in that certiorari petition without addressing the different issues petitioners raise here.

jurisdiction. As the court explained, in 28 U.S.C. 1334(b), Congress "grant[ed] the district court concurrent jurisdiction over matters that otherwise would lie within the exclusive jurisdiction of another court," Pet. App. C5, but that provision (as well as its legislative history) "reflects no intent that the bankruptcy court's jurisdiction supersede the exclusive jurisdiction of an administrative agency, or reinvest the courts with jurisdiction barred by § 1818," Pet. App. C6.

The court of appeals similarly held that 28 U.S.C. 1334(d), which gives a district court presiding over a bankruptcy petition exclusive jurisdiction over the property of the debtor's estate, did not vest the district court with exclusive jurisdiction over the Board's proceedings because "the Board has not sought control over the property of MCorp's estate in this action, only the opportunity to go forward in its administrative proceedings." Pet. App. C7.

With respect to the district court's exercise of jurisdiction, the court of appeals concluded that

> the plain language of § 1818(i) deprives the district court of jurisdiction to enjoin the Board's administrative proceedings if the Board's actions do not exceed the authority Congress granted to it.

Pet. App. C9. Turning to that inquiry, the court determined that the Board had the authority to regulate MCorp's relationship with former subsidiary banks and held that the Board was "well within its authority in seeking an order against MCorp to cease and desist any transactions which violate the provisions of § 23A, or 'to take affirmative action' as may be appropriate." Pet. App. C11 (quoting 12 U.S.C. 1818(b)(1)).

ARGUMENT

1. Petitioners broadly contend (Pet. 10-25) that Congress, in vesting federal courts with jurisdiction and equitable authority over bankruptcy matters, see 11 U.S.C. 105 and 362; 28 U.S.C. 1334, has superseded the express preclusion provision of FISA, 12 U.S.C. 1818(i).[9] As an initial matter, none of those bankruptcy provisions—by their terms—purport to repeal or qualify FISA's express limitations on federal court equitable jurisdiction. As this Court has long recognized, "[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (internal quotation marks and citation omitted). That canon of statutory construction applies with particular force where, as here, Congress has expressly limited federal court jurisdiction over a particular subject matter: "When there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by mere implication flowing from subsequent legislation." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 808 (1976).

[9] Petitioners gloss over the fact that the lower courts have unanimously agreed that Section 1818(i) divests courts of jurisdiction to enjoin pending enforcement proceedings initiated under FISA's authority to order a financial institution to "cease and desist" from unsafe or unsound practices or violations of law. See, *e.g.*, *Eastern Nat'l Bank* v. *Conover*, 786 F.2d 192, 193 (3d Cir. 1986); *Investment Co. Inst.* v. *FDIC*, 728 F.2d 518, 524-525 (D.C. Cir. 1984); *Groos Nat'l Bank* v. *Comptroller of Currency*, 573 F.2d 889, 895 (5th Cir. 1978); *First Nat'l Bank* v. *United States*, 530 F. Supp. 162, 166-168 (D.D.C. 1982).

In this case, Congres has enacted a specific jurisdictional limitation in FISA, 12 U.S.C. 1818(i), protecting a narrow class of administrative actions from premature judicial interference. In the absence of congressional intent reflected in either the text or legislative record of the various provisions petitioners invoke, the court of appeals correctly declined their invitation to divine Congress's intention to except bankruptcy proceedings from the straightforward application of FISA's withdrawal of jurisdiction.

a. Petitioners first argue (Pet. 12-15) that the Bankruptcy Code's "automatic stay" provision, 11 U.S.C. 362, carves out an exception to Section 1818(i). Section 362 generally provides that the filing of a petition in bankruptcy "operates as a stay, applicable to all entities, of—the commencement or continuation * * * of a judicial, administrative, or other action or proceeding against the debtor * * * or to recover a claim against the debtor that arose before commencement of the [bankruptcy] case." 11 U.S.C. 362(a)(1). Although Section 362 confers certain equitable powers once the court sitting in bankruptcy acquires jurisdiction, the provision does not purport to define or confer jurisdiction.[10] For that reason alone, Section 362 cannot otherwise trump the withholding of injunctive power in FISA, 12 U.S.C. 1818(i).

In any event, Section 362 could not support an injunction or stay of the Board's administrative proceedings in this case. The Bankruptcy Code provides

[10] As the court of appeals noted, the automatic stay provision does not apply if the court presiding over the bankruptcy case otherwise lacks jurisdiction over administrative proceedings in the first instance. See Pet. App. C21 n.7.

that the stay imposed by 11 U.S.C. 362(a) does not extend to "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. 362(b)(4). Contrary to MCorp's suggestion (Pet. 14), this so-called "police or regulatory powers" exception is not narrowly limited to those governmental actions affecting the public health or safety. First, no such limitation inheres in the express terms of the exception. Second, courts have long recognized that the government's "police power" "embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety." *Chicago B. & O. Ry.* v. *Illinois ex rel. Drainage Commissioners*, 200 U.S. 561, 592 (1906). And given the plain meaning of the term "regulatory,"[11] the courts of appeals have consistently held that the "police or regulatory powers" exception to the stay extends to a range of regulatory activities, including economic regulation of busines practices similar to the banking regulations at issue in this case.[12]

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[11] See, *e.g.*, *Webster's Third New International Dictionary* 1913 (1986) (defining "regulate" as "to govern or direct according to rule"); *Federal Power Comm'n* v. *Corporation Comm'n*, 362 F. Supp. 522, 532 (W.D. Okla. 1973) ("The primary meaning of the word 'regulate' is to lay down the rule by which a thing shall be done.").

[12] See, *e.g.*, *In re Commonwealth Cos., Inc.*, 913 F.2d 518, 521-526 (8th Cir. 1990) (government's action under the False Claims Act exempt from automatic stay); *Brock* v. *Rusco Indus., Inc.*, 842 F.2d 270, 273 (11th Cir.) (action under Fair Labor Standards Act to recover unpaid minimum wages exempt from automatic stay), cert. denied, 488 U.S. 889 (1988); *In re Berry Estates*, 812 F.2d 67, 71 (2d Cir.) (rent control proceedings exempt from automatic stay), cert. denied, 484 U.S. 819 (1987); *NLRB* v. *Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1986) (NLRB unfair labor practice proceedings exempt from automatic stay); *Cournoyer* v. *Town of Lincoln*, 790 F.2d 971, 974-977 (1st Cir. 1986) (action to enforce zoning restrictions exempt from automatic stay); *CFTC* v. *Co Petro Marketing Group, Inc.*, 700 F.2d 1279, 1283-1284 (9th Cir. 1983) (CFTC action to enjoin violations of Commodity Exchange Act exempt from automatic stay); *SEC* v. *First Financial Group*, 645 F.2d 429, 437 (5th Cir. 1981) (SEC enforcement action to enjoin fraudulent sales of securities exempt from automatic stay).

b. Petitioners next contend (Pet. 15-16) that the Bankruptcy Code's grant of equitable authority, 11 U.S.C. 105(a), supersedes the jurisdictional limitations of FISA. Section 105(a) provides that a court exercising bankruptcy jurisdiction "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." That provision, however, is not a roving commission to do equity or a license to advance the interests of the debtor without regard to other substantive limitations on the debtor's conduct or the bankruptcy court's power. As this Court has recognized, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 206 (1988). Indeed, the Court recently pointed out that "a bankruptcy court order [issued under Section 105] might be inappropriate if it conflicted with another law that should have been taken into consideration in the exercise of the court's discretion." *United States* v. *Energy Resources Co., Inc.*, 110 S. Ct. 2139, 2142 (1990). In other words, Section 105 —as a grant of general equitable power—does not purport to redefine bankruptcy court jurisdiction or

otherwise repeal express limitations on the court's equitable powers.

Petitioners assert that FISA's jurisdictional limitation must give way where its application would conflict with the "policies and goals of the Bankruptcy Code, or the efficient administration of a bankruptcy case." Pet. 15. But such ill-defined considerations do not supersede the sort of express legislative determination reflected in FISA, 12 U.S.C. 1818(i). As this Court had pointed out:

> If Congress wishes to grant the [bankruptcy] trustee an extraordinary exemption from non-bankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt."

Midlantic Nat'l Bank v. *New Jersey Dep't of Envt'l Protection*, 474 U.S. 494, 501 (1986) (quoting *Swarts* v. *Hammer*, 194 U.S. 441, 444 (1904)); cf. *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 110 S. Ct. 2126, 2132 n.4 (1990) (construction of Bankruptcy Code must be based on language of statute, as opposed to policy "unsupported by any textual authority"). Petitioners can point to nothing in the text of 11 U.S.C. 105 that empowers the bankruptcy court to ignore independent and express limitations on its equitable jurisdiction, such as that found in FISA, 12 U.S.C. 1818(i).

c. Finally, petitioners contend (Pet. 17-25) that Congress's general grant of jurisdiction over bankruptcy matters in 28 U.S.C. 1334 takes precedence over FISA's withdrawal of jurisdiction in 12 U.S.C. 1818(i). Petitioners first mistakenly rely on 28 U.S.C. 1334(b), which provides that

> [n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

By providing that the district court may exercise such jurisdiction "[*n*]*otwithstanding* any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts," Congress effectively superseded jurisdictional limitations that otherwise would have deprived the district court of jurisdiction over matters previously committed to the exclusive jurisdiction of another *judicial* forum. See *Brock* v. *Morysville Body Works, Inc.*, 829 F.2d 383, 385-387 (3d Cir. 1987). The statute, however, does not speak to ongoing proceedings before an administrative agency. Rather, Congress referred only to civil proceedings that would lie within a court's jurisdiction. For that reason, the court of appeals correctly concluded that Congress limited the reach of Section 1334(b) to the "division of jurisdiction between bankruptcy courts and *other courts*." Pet. App. C5.

Petitioners similarly err (Pet. 21) in asserting that 28 U.S.C. 1334(d) vests the bankruptcy courts with exclusive jurisdiction over FISA administrative proceedings.[13] Section 1334(d) gives the court *in*

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[13] Section 1334(d) provides:

> The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

rem jurisdiction to resolve issues affecting title to or control of the debtor's property, see, *e.g.*, *In re Modern Boats, Inc.*, 775 F.2d 619 (5th Cir. 1985), as opposed to exclusive general jurisdiction over any matter that happens to touch upon the debtor's estate. As this Court has pointed out in construing a predecessor to Section 1334(d):

> [A] court of bankruptcy has exclusive and non-delegable control over the administration of an estate in its possession. * * * There can be no question, however, that Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate.

Callaway v. *Benton*, 336 U.S. 132, 142 (1949) (citations omitted).[14] Here, as the court of appeals recognized, "the Board has not sought control over the property of MCorp's estate in this action, only the opportunity to go forward in its administrative proceedings." Pet. App. C7. The Board's proceedings, like all regulatory measures, may ultimately proscribe or compel certain conduct and in that indirect sense may "affect" petitioners' property. But such tangential effects may not otherwise bring the

[14] The bankruptcy court's exclusive jurisdiction over the debtor's property dates back to the Bankruptcy Act of 1898. As one commentator has explained:

> The jurisdiction of the bankruptcy court under the [1898] Act was *in rem*, and turned (absent consent of an adverse party) upon custody or possession of the court. If the property of the bankrupt were in the possession of the court * * * the bankruptcy court had the jurisdiction to determine rights and interests of contending parties in and to that property. Without possession, jurisdiction was absent.

1 *Collier Bankruptcy Manual* ¶ 3.01, at 3-11 (3d ed. 1990).

Board's administrative actions within the bankruptcy court's exclusive jurisdiction over petitioners' property.[15]

2. Petitioners also contend (Pet. 26-27) that the court of appeals' decision conflicts with *Bostwick* v. *United States*, 521 F.2d 741 (8th Cir. 1975). That contention is frivolous. First, *Bostwick* did not involve any of the statutes at issue in this case. *Bostwick* involved squaring a provision of the Internal Revenue Code, 26 U.S.C. 7421—not a provision of FISA—with the 1966 amendments to the Bankruptcy Act—not the current Bankruptcy Code or even the Code's predecessor, the Bankruptcy Reform Act of 1978. See 521 F.2d at 742, 744. Second, the bankruptcy provisions at issue in *Bostwick* do not even bear a passing similarity to the bankruptcy provisions considered below. The decision in *Bostwick* turned on bankruptcy provisions that conferred

[15] In any event, even if the provisions of the Bankruptcy Code and FISA conflicted, petitioners venture wide of the mark in asserting that the latter must disappear from the picture. See, *e.g.*, Pet. 24-25. This Court has made clear that

> [t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

Morton v. *Mancari*, 417 U.S. 535, 551 (1974). Congress, through the "police or regulatory powers" exception to the automatic stay provision, 11 U.S.C. 362(b)(4), has balanced the debtor's need for protection from actions that could impede reorganization against the government's need to enforce the law. And Congress has struck that balance in favor of enabling the government to enforce its police and regulatory powers—a state of affairs that is consistent with FISA's provisions shielding the Board's administrative proceedings from premature judicial interference.

bankruptcy court jurisdiction over "any question arising as to the amount or legality of any unpaid tax." *Id.* at 742. The decision below, by contrast, rests on different jurisdictional predicates that have no relation to jurisdiction over tax matters and do not implicate the same considerations of bankruptcy law.

Petitioners also assert in passing (Pet. 27 n.22) that the courts of appeals are divided over the question presented. That assertion is beguiling. The weight of analogous authority holds that, notwithstanding the Bankruptcy Code's general policy of affording the debtor an opportunity for rehabilitation, the bankruptcy court must adhere to statutory provisions barring the issuance of an injunction against a proceeding or other activity. *See e.g., Briggs Transp. Co.* v. *International Bhd. of Teamsters*, 739 F.2d 341, 343-344 (8th Cir.), cert. denied, 469 U.S. 917 (1984); *In re Crowe & Asscociates*, 713 F.2d 211, 214-216 (6th Cir. 1983); *In re Becker's Motor Transp., Inc.*, 632 F.2d 242, 246-247 (3d Cir. 1980), cert. denied, 450 U.S. 916 (1981); *In re Petrusch*, 14 Bankr. 825, 829 (N.D.N.Y.), aff'd per curiam, 667 F.2d 297 (2d Cir. 1981), cert. denied, 456 U.S. 974 (1982).[16]

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[16] Petitioners seek to distinguish decisions such as *Briggs* and *Crowe* on the ground that they involve the Norris-La Guardia Act, 29 U.S.C. 101 *et seq.*, a statute that "protect[s] substantive rights of private parties." Pet. 27 n.22. Such a distinction is illusory. The Norris-La Guardia Act, like FISA in 12 U.S.C. 1818(i), sets forth express limitations on the courts' equitable jurisdiction. See 29 U.S.C. 101 ("No court of the United States * * * shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute."). This Court has therefore noted that "Congress passed the Norris-La Guardia Act to curtail and regulate the jurisdiction of courts, not * * * to regulate the conduct of people engaged in labor disputes." *Marine Cooks & Stewards, AFL* v. *Panama S.S. Co.*, 362 U.S. 365, 372 (1960). Accordingly, although the Norris-La Guardia Act undoubtedly affects "substantive rights of private parties," the statute also imposes limitations on the courts' equitable jurisdiction. For that reason, the Act is no different than the FISA withdrawal of jurisdiction provision at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Second, the most obvious class of power that the Board has over banks is through its central bank functions. These directly affect the parties here, through reserve and margin requirements for instance, but they are fashioned at a higher level than individual bank operation. These are not involved; the bank subsidiaries of MCorp will continue to abide by the Board's general regulation of banking transactions.

Third, the Board is charged generally with supervision of bank and bank holding company practices that may endanger the integrity of the banks and the system of banks. These vaguely defined powers cover items from the requirement of minimum capital to the prohibition of self-dealing.

Fourth, the Board asserts the authority to direct the activities, of the holding company's nonbank subsidiaries in their transactions unrelated to banks or banking including forcing a sale for capital infusion.

8. *Priority of Regulation.*

Banks cannot file for bankruptcy; they must reorganize or liquidate under the banking laws. Bank holding companies, however, are not prohibited from recourse to bankruptcy, and while they are regulated by banking agencies, they cannot be reorganized or liquidated under the laws for banks. Congress has amended both the banking and the bankruptcy laws several times, never resolving this potential conflict.

The new bankruptcy code was adopted in 1978, long after bank holding companies had been regulated. The holding company act has been frequently amended itself. The dual nature of bank holding companies implicates the interests of the systems both of regulation and of reorganization. The statutes as enacted limit the bank regulators to primacy in dealing with banks.

When a bank holding company is a debtor in possession, the conflict between the court's restructuring of the corporation and the Board's regulating can be resolved by allowing the Board to participate in the court proceeding. Preclusion by the bankruptcy forum would not cover the Board's clearinghouse or monetary functions, but it would restrict the Board's supervision of MCorp's asset allocation, intra-group transaction, and third-party contracts. This would give the Debtor the reprieve needed to retrieve its vitality.

Allowing the Board's proceedings to continue in a separate forum poses several problems. Parallel proceedings are both confusing and inefficient. The potential for a successful reorganization would be jeopardized. The bankruptcy code is designed to be a comprehensive plan to rehabilitate the debtor to the exclusion of actions impairing reorganization.

Without minimizing the importance of the Board's administrative power over bank holding companies, the need for the court's power over the entirety of the debtor's estate takes precedence. This preemption is supported by policy and law.

Financial Institutions Supervisory Act, 12 U.S.C. § 1818(i), says:

> [N]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

Similar jurisdictional limitations have been overridden through control of the debtor's estate having been entrusted to the authority of the bankruptcy court. This construction has been employed in cases affecting the Court of Claims and the Tax Court (both administrative rather than judicial); their jurisdictional grants are parallel to the Board's and distinct from the judicial power through the bankruptcy code. *See In re Casey Corp.*, 46 B.R. 473 (Bankr.S.D.Ind. 1985); *Bostwick v. United States*, 521 F.2d 741 (8th Cir. 1975).

The *in rem* proceedings in admiralty, which are particular liquidation actions, yield to the bankruptcy code's plan for general liquidation. This is true even though maritime jurisdiction is directly a judicial power of international significance.

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